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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 ERIC WILTON BURTON,
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Petitioner,

v.
DIRECTOR OF CALIFORNIA
DEPARTMENT OF CORRECTIONS
AND REHABILITATION,

Respondent.

Civil No. 08-0325 LAB (POR)

**ORDER GRANTING APPLICATION
TO PROCEED IN FORMA
PAUPERIS AND DISMISSING
PETITION WITHOUT PREJUDICE**

Petitioner, a state prisoner proceeding pro se, has submitted a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, together with a request to proceed in forma pauperis.

REQUEST TO PROCEED IN FORMA PAUPERIS

Petitioner has no funds on account at the California correctional institution in which he is presently confined. Petitioner cannot afford the \$5.00 filing fee. Thus, the Court **GRANTS** Petitioner's application to proceed in forma pauperis. The Clerk of the Court shall file the Petition for Writ of Habeas Corpus without prepayment of the filing fee.

FAILURE TO USE PROPER FORM

A Petition for Writ of Habeas Corpus must be submitted in accordance with the Local Rules of the United States District Court for the Southern District of California. See Rule 2(c), 28 U.S.C. foll. § 2254. In order to comply with the Local Rules, the petition must be submitted

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1 upon a court-approved form and in accordance with the instructions approved by the Court.
 2 Presently, Petitioner has submitted an application for writ of habeas corpus on a non-approved
 3 form.

4 **FAILURE TO ALLEGE EXHAUSTION OF STATE COURT REMEDIES**

5 The Petition must be dismissed because Petitioner has not clearly alleged exhaustion of
 6 state judicial remedies as to all of his claims. Habeas petitioners who wish to challenge either
 7 their state court conviction or the length of their confinement in state prison, must first exhaust
 8 state judicial remedies. 28 U.S.C. § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34
 9 (1987). To exhaust state judicial remedies, a California state prisoner must present the
 10 California Supreme Court with a fair opportunity to rule on the merits of every issue raised in
 11 his or her federal habeas petition. 28 U.S.C. § 2254(b), (c); *Granberry*, 481 U.S. at 133-34.
 12 Moreover, to properly exhaust state court remedies a petitioner must allege, in state court, how
 13 one or more of his or her federal rights have been violated. The Supreme Court in *Duncan v.*
 14 *Henry*, 513 U.S. 364 (1995) reasoned: “If state courts are to be given the opportunity to correct
 15 alleged violations of prisoners’ federal rights, they must surely be alerted to the fact that the
 16 prisoners are asserting claims under the United States Constitution.” *Id.* at 365-66 (emphasis
 17 added). For example, “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a
 18 state court trial denied him [or her] the due process of law guaranteed by the Fourteenth
 19 Amendment, he [or she] must say so, not only in federal court, but in state court.” *Id.* at 366
 20 (emphasis added).

21 Petitioner fails to clearly allege that he raised each of his claims in the California Supreme
 22 Court. Although Petitioner alleges he was denied habeas relief in the California Supreme Court,
 23 it is impossible to discern from his voluminous and unorganized petition, whether the claims he
 24 raises here were raised before the state supreme court.¹ If Petitioner has raised his claims in the
 25 California Supreme Court he must so specify, as to each claim. “The burden of proving that a
 26 claim has been exhausted lies with the petitioner.” *Matthews v. Evatt*, 105 F.3d 907, 911 (4th

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 28 ¹ The Court notes that previous petitions for habeas corpus filed in this Court by Petitioner were dismissed pursuant to the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). See *Burton v. Clark*, 06cv2336 LAB (NLS) (Order filed Oct. 10, 2006) (doc. no. 3); *Burton v. Hernandez*, 06cv1384 L (JMA) (Order filed May 15, 2007) (doc. no. 5).

1 Cir. 1997); *see Breard v. Pruett*, 134 F.3d 615, 619 (4th Cir. 1998); *Lambert v. Blackwell*, 134
 2 F.3d 506, 513 (3d Cir. 1997); *Oyler v. Allenbrand*, 23 F.3d 292, 300 (10th Cir. 1994); *Rust v.*
 3 *Zent*, 17 F.3d 155, 160 (6th Cir. 1994).

4 Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death
 5 Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ
 6 of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation
 7 period shall run from the latest of:

8 (A) the date on which the judgment became final by the
 9 conclusion of direct review or the expiration of the time for seeking
 such review;

10 (B) the date on which the impediment to filing an application
 11 created by State action in violation of the Constitution or laws of the
 United States is removed, if the applicant was prevented from filing
 12 by such State action;

13 (C) the date on which the constitutional right asserted was
 14 initially recognized by the Supreme Court, if the right has been
 newly recognized by the Supreme Court and made retroactively
 applicable to cases on collateral review; or

15 (D) the date on which the factual predicate of the claim or
 16 claims presented could have been discovered through the exercise
 of due diligence.

17 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West Supp. 2002).

18 The statute of limitations does not run while a properly filed state habeas corpus petition
 19 is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999).
 20 *But see Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’
 21 when its delivery and acceptance [by the appropriate court officer for placement into the record]
 22 are in compliance with the applicable laws and rules governing filings.”). However, absent some
 23 other basis for tolling, the statute of limitations does run while a federal habeas petition is
 24 pending. *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001).

25 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a
 26 habeas petition “[i]f it plainly appears from the face of the petition and any exhibits annexed to
 27 it that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll.

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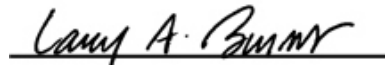
1 § 2254. Here, it appears plain from the Petition that Petitioner is not presently entitled to federal
2 habeas relief because he has not alleged exhaustion of state court remedies.

3 **CONCLUSION**

4 For the foregoing reasons, the application to proceed in forma pauperis is **GRANTED**
5 and the Petition is **DISMISSED** without prejudice for failure to use the proper form and failure
6 to allege exhaustion of state court remedies. In order to have this case reopened, Petition must,
7 **no later than June 16, 2008**, file a First Amended Petition, on the proper form, in which he
8 includes a succinct and clear explanation of his claims and alleges exhaustion of state judicial
9 remedies as to each claim he has raised before the California Supreme Court. *For Petitioner's*
10 *convenience, the Clerk of Court shall attach to this Order a blank First Amended Petition form.*

11 **IT IS SO ORDERED.**

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13 DATED: April 17, 2008

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15 **HONORABLE LARRY ALAN BURNS**
16 United States District Judge
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